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PYRO SPECTACULARS, INC.

BEFORE THE STATE WATER RESOURCES CONTROL BOARD OF THE STATE OF CALIFORNIA

IN THE MATTER OF PERCHLORATE CONTAMINATION AT A 160-ACRE SITE IN THE RIALTO AREA	SWRCB/OCC FILE A-1824 **PYRO SPECTACULARS, INC.'S ("PSI") HEARING BRIEF** Date: May 8-10, 2007 - May 15-17, 2007 Location: San Bernardino County Auditorium 850 East Foothill Blvd. Rialto, CA

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In accordance with the Second Revised Notice of Public Hearing dated April 3, 2007, Pyro Spectaculars, Inc. ("PSI") submits its brief for the hearing in this matter.

I. INTRODUCTION

These proceedings potentially involve hundreds of millions in dollars. Rialto has estimated that cleanup of the 160-Acre Property potentially could cost hundreds of millions of dollars. (Holub Depo., Vol. 3, April 6, 2007, 248:23 - 249:2.) Even installing one monitoring well is well over $100,000. (Sturdivant Depo., Vol. 1, March 20, 2007, 42:4-22.) PSI is without the financial resources to participate in any such effort. (Declaration of Cheryl A. Samperio, PSI 2001802-04.)

PSI is a small family business owned by the Souza family. PSI has approximately 25 full-time employees and is in the business of putting on public fireworks displays. (Declaration of James R. Souza ("Souza Decl."), ¶¶ 6, 8.) As the Advocacy Team Admits:

> Pyro Spectaculars is a public display fireworks operator, fireworks importer/exporter, and fireworks wholesaler (Pyro Spectaculars, 2003). Pyro Spectaculars purchases and imports finished fireworks, stores them in approved facilities, and repackages them for displays and other professional, licensed users.

(Advocacy Team's Supplementary Evidence, Exhibit 1 at 49.)

Since 1979, PSI has operated on approximately 25 acres of leased land within the 160-Acre Property. (Souza Decl., ¶ 10, 20.) PSI never used TCE. PSI did not manufacture fireworks or any other perchlorate-containing products at the 160-Acre Property. (Exhibit P7; Souza Decl., ¶¶ 9, 10; Deposition of Kamron Saremi ("Saremi Depo."); Vol. 2, March 23, 2007, 372:1-10; 595:12 - 596:3; 676:10-13; Deposition of Robert Holub ("Holub Depo."); Vol. 1, March 8, 2007, 178:7-13.)

As we discuss more fully below, PSI's operations on the 160-Acre Property (or elsewhere) could not be responsible for the perchlorate contamination in soil or groundwater throughout the Rialto-Colton Basin. However, large-scale perchlorate contamination probably resulted from the fireworks manufacturing operations of the Apollo

Division of Pyrotronics Corporation ("Apollo") at the 160-Acre Property because Apollo's fireworks manufacturing operation handled "orders of magnitude" more perchlorate than PSI. (Holub Depo., Vol. 3, April 6, 2007, 783:12-785:13.) Apollo's operations have been well known for decades by three members of the Advocacy Team, Gerard Thibeault, Kurt Berchtold and Robert Holub, because those Advocacy Team members were involved with the inspection and alleged "closure" of what is now known as "the McLaughlin Pit," Apollo's fireworks manufacturing Class I surface impoundment. For example, according to Advocacy Team member Robert Holub's deposition testimony:

Q. Okay. Do you think that perchlorate underneath that swimming pool, that 209,000 micrograms per kilogram – I think it was the highest soil sample you've ever seen in your entire career in your region; right?

A. Yes.

Q. Do you think that came from Apollo's operations?

A. I think some of it may have.

Q. How much?

A. I don't know.

Q. All of it?

(Objection omitted.)

A. I don't know.

(Holub Depo., Vol. 3, April 6, 2007, 606:5-18.)

In contrast, the Advocacy Team has no idea whatsoever how much of PSI's waste contained perchlorate. (Sturdivant Depo., Vol. 2, March 28, 2007, 14:3-9; Saremi Depo., Vol. 2, March 23, 2007, 374:13-16; Saremi Depo., Vol. 3, March 27, 2007, 726:12-16; Holub Depo., Vol. 1, March 8, 2007, 181:20-24.)

A. The Necessary Evidence To Prove A Case Against PSI Does Not Exist

The Advocacy Team does not have evidence to prove its case against PSI. In depositions, Advocacy Team witnesses have admitted that PSI did not manufacture fireworks on the 160-Acre Property. (Saremi Depo., Vol. 2, March 23, 2007, 372:1-10;

676:10-13; Holub Depo., Vol. 4, April 9, 2007, 1072:19-22.) The Advocacy Team admits PSI did not use TCE. (Saremi Depo., Vol. 2, March 23, 2007, 595:12 - 596:3; Holub Depo., Vol. 1, March 8, 2007, 178:7-13.) The only question for PSI is whether PSI actually discharged perchlorate to groundwater or onto the ground in a manner that "threatens" groundwater and such discharges of perchlorate created a condition of pollution or nuisance. Water Code Section 13304(a). Before any cleanup and abatement order can be issued to PSI for operations at the 160-Acre Property, the Advocacy Team must prove that perchlorate from PSI's operations at the 160-Acre Property either actually reached the groundwater 400 feet below ground surface or "threatens" the groundwater 400 feet below ground surface. "Threatens" is defined in the Water Code to mean "[a] condition creating a substantial probability of harm, when the probability and potential extent of harm make it reasonably necessary to take immediate action to prevent, reduce, or mitigate damages to persons, property, or natural resources." Id. (Emphasis added.) Advocacy Team member Robert Holub testified under oath that with respect to all three of the alleged dischargers, he does not know whether or not perchlorate from any of their operations is within a hundred feet of groundwater. (Holub Depo., Vol. 4, April 9, 2007, 956:2-6.) There is no evidence that perchlorate from any alleged discharges by Goodrich, West Coast Loading or PSI is within a hundred feet of groundwater. (Holub Depo., Vol. 4, April 9, 2007, 956:7-16.) Accordingly, the Advocacy Team cannot meet its burden that any perchlorate from PSI was discharged to or "threatens" groundwater.

Each and every Advocacy Team witness who was actually involved in the investigation[1] admits that they do not know whether PSI discharged perchlorate to groundwater or to soil in a manner that threatens groundwater. For example, Robert Holub, the Santa Ana Regional Water Quality Control Board's ("Regional Board") supervising water resource control engineer, one of the three primary persons at the Regional Board involved in the investigation and a drafter of the draft Amended Cleanup and Abatement Order that serves as the Advocacy Team's pleading ("Draft CAO"), testified:

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[1]Robert Holub, Ann Sturdivant and Kamron Saremi.

Q. Did any perchlorate from PSI get to the groundwater?

A. It's my opinion that -- I don't have analytical data that shows perchlorate from PSI got to groundwater.

Q. And that's not just for the McLaughlin pit, that's for the entire 160-acre parcel; correct?

A. Yes.

(Holub Depo., March 8, 2007 Vol. 1, 183:20-184:1.)

Ann Sturdivant, the Regional Board's senior engineering geologist, one of the persons at the Regional Board involved in the investigation and a primary drafter of the Draft CAO, testified:

Q. So on any given day, at any sample that's taken from this basin, when you actually take the sample and you look at the data, and if you see perchlorate or you see trichloroethylene, you can't say under oath that that TCE or perchlorate came from any particular operation versus another one, can you?

A. In the water?

Q. Yes.

A. Probably not.

(Sturdivant Depo., Vol. 3, March 29, 2007, 717:15-23.)

Kamron Saremi, the Regional Board's water resources control engineer, one of the persons at the Regional Board involved in the investigation and a contributor of information for the Draft CAO, testified:

Q. . . . And based upon the number of years that these properties have been used by all of these different users and based upon the record that you have in your own file --

A. Yes.

Q. -- you can't say whose perchlorate or trichloroethylene is in any particular well at any particular time, can you, sir?

A. I don't think we can link -- Yeah, that – that's correct.

Q. You can't do that; right?

A. Yeah, because perchlorate and TCE, they were basically common salt and common solvent.

(Saremi Depo., Vol. 2, March 23, 2007, 447:15-448:2.)

No evidence exists of the amount of perchlorate, if any, that may have been released by PSI to the ground at the 160-Acre Property. There are no documents the Advocacy Team can introduce to prove the amount of perchlorate released by PSI either in total or at any one time at the 160-Acre Property. There are no witnesses to prove the amount of perchlorate released by PSI either in total or at any one time at the 160-Acre Property. There is no scientific evidence to establish perchlorate from PSI's operations either reached or may reach groundwater 400 feet below the 160-Acre Property. The Advocacy Team has no groundwater model. The Advocacy Team has no vadose zone model. Accordingly, it is not possible for the Advocacy Team to prove perchlorate from PSI's operations actually reached groundwater or "threatens" groundwater.

The Advocacy Team may be able to prove: (1) PSI handled finished products containing perchlorate at the 160-Acre Property; (2) PSI burned pyrotechnic waste at the 160-Acre Property, but not how much of the pyrotechnic waste was perchlorate and not how much perchlorate, if any, was left after burning; (3) PSI tested products containing perchlorate at the 160-Acre Property, but not how much perchlorate remaining after a test, if any, got to the ground; (4) PSI put a small but unknown number of dud aerial shells containing an unknown amount of perchlorate into the McLaughlin Pit over the course of no more than three years, but it was PSI's practice to remove the shells, the McLaughlin Pit was cleaned out from time to time and, Apollo, the fireworks manufacturer who built and operated the McLaughlin Pit, put massive amounts of fireworks manufacturing waste into the McLaughlin Pit from 1972 to about June 1983.[2] The Advocacy Team witnesses admit

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[2]As set forth above, this information comes from a January 24, 1985 Regional Board inspection report for Apollo. Bruce Paine of the Regional Board Staff memorialized a conversation with Pedro Mergil of Apollo. Mr. Paine recorded that Mr. Mergil said Apollo had not used the pond for 18 months or approximately until June 1983.

that they cannot distinguish the perchlorate in the soil or groundwater from Apollo and have no data to show that perchlorate from PSI's operations on the 160-Acre Property resulted in soil or groundwater contamination at the 160-Acre Property or in any well in the Rialto-Colton Basin. The facts listed above as to what the Advocacy Team may be able to prove are not enough to prove its Water Code section 13304 case against PSI.

Because the Advocacy Team has no actual evidence against PSI necessary to meet the requirements of Water Code Section 13304, the Advocacy Team attempts to wrongly create the impression that PSI had a large-scale fireworks operation typical of a manufacturer, including the use of a lot of raw perchlorate and the generation of large amounts of perchlorate-containing waste. The Advocacy Team's efforts in this regard are particularly troubling given that it seeks to make PSI legally responsible for the hundreds of millions of dollars it will allegedly cost to investigate and cleanup the Rialto-Colton Basin. (Holub Depo., Vol. 3, April 6, 2007, 248:23 - 249:2; Sturdivant Depo., Vol. 1, March 20, 2007, 42:4-22.)

In its Memorandum of Points and Authorities in the section entitled "Evidence of Waste Discharge by Pyro Spectaculars, Inc." at pages 86 to 90, the Advocacy Team engages in a less than complete discussion of the regulatory history of the McLaughlin Pit. This less than complete discussion of the regulatory history of the McLaughlin Pit in the Advocacy Team's Memorandum has nothing to do with PSI. Instead, it concerns the Regional Board Staff's involvement with Apollo, a manufacturer of fireworks at the 160-Acre Property with operations dating back to at least 1968, and Ken Thompson, Inc., which failed to properly close the McLaughlin Pit. By placing this regulatory history discussion in the section regarding PSI, the Advocacy Team seeks to make it seem as if PSI and Apollo are one company, even though the Advocacy Team knows this is not so. Worse yet, this discussion omits the evidence known to the Advocacy Team that: (1) Ken Thompson, Inc. is legally responsible for the closure of the McLaughlin Pit, not PSI; (2) The Regional Board Staff utterly failed to enforce the waste discharge requirements for the McLaughlin Pit against Apollo who violated them repeatedly; and, (3) The Regional Board Staff utterly

failed to require a proper Subchapter 15 closure of the McLaughlin Pit by Apollo or Ken Thompson, Inc., even though the Regional Board's own files insist a proper Subchapter 15 closure is required by law.

The Advocacy Team tries to give the false impression PSI had a much larger operation that actually disposed of large amounts of raw perchlorate on the 160-Acre Property. The Advocacy Team does this by the way it defines "pyrotechnic waste" in the Draft CAO. (See Paragraphs 40 - 49 of the Draft CAO.) The use of the term "pyrotechnic waste" by the Advocacy Team in allegations against PSI is particularly misleading because it wrongly suggests "pyrotechnic waste" is 100% perchlorate. As to PSI, this is not true. Most of PSI's waste was fuse (including Quickmatch) which does not contain perchlorate. (Exhibit 7; Souza Decl. ¶ 21.) In the Draft CAO, "pyrotechnic waste" is defined in Paragraph 39 which states:

> Prior to 1971, it was the practice among the various pyrotechnic companies that conducted business at, and adjacent to, the Property to utilize several earthen pits for the disposal of unusable, defective and excess fireworks, chemicals and other waste (hereinafter collectively referred to as pyrotechnic waste). The pyrotechnic waste was taken to the earthen pits, which were located south-southwest of what would become Pyro Spectaculars' 47-acre site, and burned.

(Emphasis added.) The definition of "pyrotechnic waste" is buried in a parenthetical. Thus, the term "pyrotechnic waste" used throughout the Draft CAO means "unusable, defective and excess fireworks, chemicals and other waste." (Deposition of Ann Sturdivant ("Sturdivant Depo."), Vol. 1, March 20, 2007, 186:23 - 187:7.) Notice that "chemicals" and "other waste" are not defined. (Draft CAO, ¶ 39.) According to the drafter of Paragraph 39 of the Draft CAO, "other waste" and "pyrotechnic waste," as used throughout the Draft CAO, could include other waste that is neither flammable nor hazardous. (Sturdivant Depo., Vol. 1, March 20, 2007, 175:19-21.) According to Ms. Sturdivant's testimony, the term "pyrotechnic waste" in the Draft CAO includes:

a. Paper (Sturdivant Depo., Vol. 1, March 20, 2007, 175:8-9.);

b. Cardboard (Sturdivant Depo., Vol. 1, March 20, 2007, 175:10-11.);

c. Fuse (Sturdivant Depo., Vol. 1, March 20, 2007, 175:12-13.);

d. Black powder (Sturdivant Depo., Vol. 1, March 20, 2007, 175:14-15.); and,

e. "Any other waste that isn't specified here. That was the intent." (Sturdivant Depo., Vol. 1, March 20, 2007, 175:16-18;Vol. 2, March 28, 2007, 13:10-14:2.)

It is common knowledge that paper and cardboard do not contain perchlorate. In addition, Advocacy Team members admit that neither fuse nor black powder include perchlorate. (Sturdivant Depo., Vol. 1, March 20, 2007, 153:2-9; Holub Depo., Vol. 1, March 8, 2007, 181:16-19.)

The Advocacy Team also tries to make PSI's operation seem bigger than it is by repeatedly stating in the Draft CAO that PSI operated on 47 acres, more than 1/4 of the 160-Acre Property. (Draft CAO, ¶¶ 37, 39 and 42.) However, the Advocacy Team knows PSI only operated in the 160-Acre Property on 25 acres, as evidenced by numerous documents in Regional Board files, including the March 5, 2004 and April 8, 2004 letters signed by Advocacy Team member Gerard Thibeault, the Regional Board's Executive Officer. (Exhibits P12 and P13.) The "three contiguous parcels" listed in the Draft CAO as PSI's area include areas where PSI never operated and where Apollo did. Advocacy Team member Kamron Saremi admitted this in his deposition:

Q. Okay. You see where it starts in the second sentence of that paragraph, it says, "Pyro Spectaculars established operations in 1979 on three contiguous parcels, consisting of approximately 47 acres within the Property. The 47 acres on which Pyro Spectaculars operated was in the northwest half of the southwest quarter of Section 21, Township 1 North, Range 5 West, San Bernardino" and so forth. Do you see that?

A. Yes, I do.

Q. Okay. Now, based on your review of the plot plan we just looked at a minute ago, 3925, Pyro Spectaculars' operations does not constitute 47 acres, does it?

(Objection omitted.)

A. Not based on the parcel map and – and area that you asked me earlier, no.

Q. Pyro Spectaculars' operation is not more than a quarter of the 160 acres, is it? You've been out there.

(Objection omitted.)

THE WITNESS: That - That's what I believe.

(Saremi Depo., Vol. 3, March 27, 2007, 705:22 - 706:18.)

Even prior to the depositions of members of the Advocacy Team, the Regional Board Staff knew very well that PSI did not manufacture fireworks on the 160-Acre Property. (Draft CAO, ¶ 36; Exhibits P10, P12 and P13.) As stated in Gerard Thibeault's June 6, 2002 letter to Senator Nell Soto, the Advocacy Team is well aware that "the manufacture of fireworks is the type of activity that likely would have resulted in a release of perchlorate." (Exhibit P125.) For many years, members of the Advocacy Team personally have known that Apollo, a large-scale manufacturer of fireworks, operated on the 160-Acre Property from 1968 until its bankruptcy in 1986. Advocacy Team member Kurt Berchtold inspected the Apollo waste pond now known as the McLaughlin Pit. Advocacy Team member Robert Holub and Advocacy Team member Gerard Thibeault were involved in the alleged "closure" of the McLaughlin Pit. Apollo purchased tens of thousands of pounds of perchlorate at a time, used vast amounts of water in its operations and, in a 1985 Hazardous Materials Disclosure Form, reported that in any month it could have 25,000 pounds or more of perchlorate on hand. (Exhibits P23, P24, P44, P45, P65 at PSI 3000517 and P66.) Mr. Holub testified that the amount of perchlorate used by Apollo was orders of magnitude greater than that used by PSI. (Holub Depo., April 6, 2007, 279:11-281:12.) For example, by 1978 or sooner, Apollo was discharging 3,000 gallons per day of fireworks manufacturing waste to the McLaughlin Pit. (Exhibits P38, P39 and P40.) Similarly, the Advocacy Team has been well aware for decades that Ken Thompson took responsibility for clean up and closure of the McLaughlin Pit. (Exhibit P27 at PSI 3000288 and PSI 3000320.)

The Advocacy Team seeks to make PSI bear all responsibility for the McLaughlin Pit to conceal the Regional Board Staff's own failure to follow the law. Contrary to claims in the Draft CAO, PSI never used the McLaughlin Pit for waste disposal. PSI only placed a very small number of dud aerial shells in the McLaughlin Pit for the limited purpose of soaking them in order to soften the adhesive so that the aerial shell could then be removed from the McLaughlin Pit, opened and burned elsewhere. (Souza Decl., ¶¶ 23-24.) In contrast, Apollo constructed the McLaughlin Pit for the purpose of disposing its perchlorate-laden fireworks manufacturing waste with the Regional Board Staff's blessing. (Exhibits P38, P39 and P40.) At the request of Apollo, in 1978, the Regional Board, on Staff's recommendation, permitted Apollo to increase its industrial waste disposal from 150 gallons per day to up to 3,000 gallons of perchlorate-laden waste per day to the McLaughlin Pit, which Regional Board staff knew only had a total capacity of 12,000 gallons. (Exhibits PP31, P36, P38, P39, and P40.)

When it came time for Apollo and the subsequent owner, Ken Thompson, Inc., to close the McLaughlin Pit, the Regional Board Staff (including Advocacy Team members) knew the legal requirements imposed by Subchapter 15 (Exhibits P68, P69, P73 and P81), but failed to enforce them. In addition, Rialto required proper cleanup and closure of the McLaughlin Pit as a mitigative measure included in the California Environmental Quality Act ("CEQA") negative declaration for Ken Thompson, Inc. The proper cleanup and closure of the McLaughlin Pit was required to be completed before development could begin on the entire Southern half of the 160-Acre Property. (Exhibit PP85 and P86.) Rialto and Ken Thompson, Inc. failed to meet these CEQA requirements. Now, instead of owning up to Regional Board Staff's failures, the Advocacy Team seeks to place the burden of Apollo's operations not on Ken Thompson, Inc., who agreed to take care of closing the McLaughlin Pit, but on PSI, who only had very limited use of the McLaughlin Pit.

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B. PSI Was Added To The Draft CAO In October 2006, After Significant Cooperation By PSI, Especially Considering Its Limited Financial Resources

In or about October 2006, PSI was very surprised when it was notified it would be included in the Draft CAO. The initial Cleanup and Abatement Order was issued in February, 2005 and did not include PSI. The initial Cleanup and Abatement Order was amended in December 2005 and still did not include PSI. Only an investigation directive under Water Code Section 13367 had been issued by the Regional Board to PSI.

PSI, despite limited financial resources, took soil samples in its operational areas and installed three multi-depth groundwater monitoring wells at three locations that were necessary to investigate the nature and extent of contamination. Because the depth to groundwater is in the 400 feet below ground surface range and the soil is full of large boulders and cobbles, installing even one monitoring well is time consuming and expensive.

PSI performed the investigation work despite its potential for serious financial consequences in doing so. Between soil sampling, well installation and quarterly sampling of the wells, PSI has expended approximately $1,500,000.00 in responding to perchlorate and TCE conditions at the 160-Acre Property. (Declaration of Brian L. Zagon ("Zagon Decl."), ¶ 2.) PSI's investigation was done with the with the full knowledge and support of the Regional Board Staff, including members of the Advocacy Team. (Holub Depo., Vol. 2, April 4, 2007, 308:16-19.; Sturdivant Depo., Vol. 1, March 20, 2007, 46:15 - 47:7; Saremi Depo., Vol. 2, March 23, 2007, 533:7-11.) The Regional Board Staff considered all of this work helpful and satisfactory. (Sturdivant Depo., Vol. 1, March 20, 2007, 46:15 - 47:7; Saremi Depo., Vol. 2, March 23, 2007, 577:4 - 578:23.) PSI continues to sample its wells quarterly and to submit the data to the Regional Board Staff. (Zagon Decl., ¶ 3.)

II. PSI'S OPERATIONS ON THE 160-ACRE PROPERTY

PSI is a small family business. PSI has approximately 25 full time employees. PSI was incorporated in 1979, a few months after the 4th of July Season. PSI purchased the non-manufacturing assets of the California Fireworks Display Company, a division of

Apollo, after PSI was incorporated. The asset purchase contract between PSI and Apollo makes it clear that there was no assumption of any of Apollo's liability by PSI. (Exhibit P142.) PSI was never an affiliated or subsidiary corporation to Apollo. PSI and Apollo each had separate operations on the 160-Acre Property from the time of PSI's formation in 1979 until Apollo ceased operations in the mid-1980's. (Souza Decl., ¶¶ 2, 4, 8.)

Since PSI began operations in the fall of 1979, PSI has been in the business of putting on public fireworks displays. As a fireworks display company, PSI imports, stores and repackages sealed fireworks display shells at its 25-acre leasehold on the 160-Acre Property. PSI always has purchased finished fireworks for use in its public display business. In finished fireworks, fireworks composition is inside a sealed fireworks container. The finished fireworks are sent to PSI in sealed boxes. (Souza Decl., ¶¶ 6, 11, 15.)

PSI only has used its leased property on the 160-Acre Property for storage of finished fireworks and for preparation of finished fireworks for use in public fireworks displays. These operations have never involved handling of fireworks composition, the chemicals used inside finished fireworks. PSI did not manufacture fireworks or any perchlorate-containing products at the 160-Acre Property. PSI never used TCE. (Souza Decl., ¶¶ 9, 10; Saremi Depo., Vol. 2, March 23, 2007, 372:1-10; 595:12 - 596:3; 696:10-13; Holub Depo., Vol. 1, March 8, 2007, 178:7-13.)

Public fireworks displays by PSI typically involve the use of aerial shells which are shot from a device called a mortar into the sky, using a lift charge attached to the bottom of the aerial shell. The lift charge attached to the aerial shell contains "black powder," which is a form of gun powder. The Advocacy Team admits that "black powder" does not contain perchlorate in any form. (Sturdivant Depo., Vol. 1, March 20, 2007, 153:7-9; Holub Depo., Vol. 1, March 8, 2007, 181:16-19.) Aerial shells typically are cylindrical or round in shape. (Souza Decl., ¶¶ 13, 14.) Pictures of examples of aerial shells are below.

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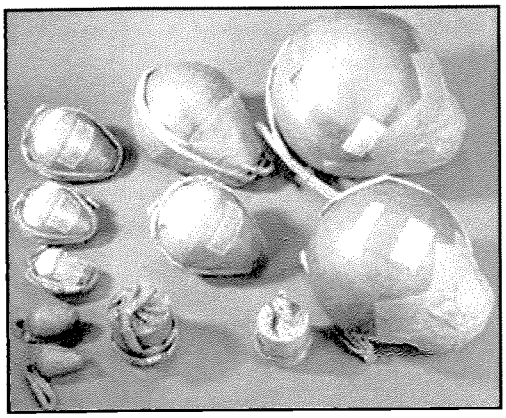

For aerial shells, fireworks composition is encased in a thick container, usually made of layers of pasteboard. Aerial shells used in public fireworks displays generally range from 3 inches in diameter to 12 inches in diameter. Generally, the larger the aerial shell, the thicker the pasteboard container. The thick container is necessary to hold the aerial shell together to withstand the thrust of the black powder lift charge and until the materials inside the aerial shell are ignited and propelled outside of the bursting shell, after the aerial shell is shot into the sky. (Souza Decl., ¶ 14; Exhibit P7.)

PSI purchases finished fireworks from manufacturers to use in its public fireworks display business. PSI never has manufactured any fireworks on the 160-Acre Property. Because it used finished fireworks, the vast majority of PSI's waste was fuse made of black powder and string that was snipped off of finished aerial shells so the aerial shells could be fired electronically. (Souza Decl., ¶¶ 15, 21.)

Aerial shells used in these public displays almost always perform as planned. On extremely rare occasions, aerial shells do not perform as expected. The vast majority of the aerial shells that do not perform as expected can be reused because the failure is due to an ignition issue before the shells leave the mortar. Only aerial shells that leave the mortar, but do not explode (called "duds") cannot be reused. A relatively small amount of duds were returned per year. PSI did not keep records of the type of shell that was a dud, so there is no way to know the type or total amount of fireworks composition in any of these duds. (Souza Decl., ¶ 23.)

PSI never used "the McLaughlin Pit" for waste disposal. The very small number of duds temporarily were placed in "the McLaughlin Pit" to soak, were then removed and disposed of elsewhere, via burning pursuant to duly authorized permits issued by Rialto Fire Department. It was PSI's custom and practice not to leave aerial shells in the McLaughlin Pit. The purpose of soaking the duds was to soften the adhesive so that the aerial shells could then be removed from the McLaughlin Pit, opened and burned elsewhere. (Exhibit P15 at PSI 30000121; Souza Decl., ¶¶ 23, 24.) According to the Regional Board's own records, the McLaughlin Pit was no longer used after about June 1983.[3] (Exhibits P27 at PSI 3000371 and P64 at PSI 3000511.)

PSI periodically burned wood, cardboard, pasteboard, fuse (including Quickmatch), black powder and a few defective finished fireworks on the 160-Acre Property. The materials burned by PSI mostly consisted of fuse (including Quickmatch) and black powder. Extremely small quantities of fireworks composition as a part of the small number of defective fireworks and duds were destroyed by PSI during these burns. All the burning of these materials by PSI was done pursuant to permits issued by Rialto Fire Department and in accordance with industry standards. (Exhibit P7; Souza Decl., ¶ 26.)

All soil samples from PSI's operational areas on its leasehold on the 160-Acre Property have been non-detect for perchlorate. (Exhibit P10.) Based on the data, Advocacy Team member Gerard Thibeault sent PSI a letter on March 5, 2005 stating that no additional soil samples were required at PSI's facility. (Exhibit P12.)

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[3]This information comes from a January 24, 1985 Regional Board inspection report for Apollo. Bruce Paine of the Regional Board Staff memorialized a conversation with Pedro Mergil of Apollo. Mr. Paine recorded that Mr. Mergil said Apollo had not used the pond for 18 months, placing the time of last use at approximately June 1983.

III. NO CAO CAN BE ISSUED AGAINST PSI UNLESS THE ADVOCACY TEAM PROVES BY A PREPONDERANCE OF THE EVIDENCE THAT RELEASES OF PERCHLORATE BY PSI ACTUALLY ARE IN GROUNDWATER OR "THREATEN" GROUNDWATER SUCH THAT AN IMMEDIATE RESPONSE IS REQUIRED

In order for any CAO to issue, the Advocacy Team must prove that PSI actually discharged perchlorate to groundwater or onto the ground in a manner that "threatens" groundwater and that such discharges of perchlorate created a condition of "pollution" or "nuisance." Water Code Section 13304(a). As discussed in detail below, admissions of Advocacy Team witnesses establish that there is no legal basis for issuance of any CAO. Possibility, speculation and conjecture are not sufficient proof, even of matters that need only be proven by a preponderance of the evidence (see generally Roddenberry v. Roddenberry (1996) 44 Cal.App.4th 634, 651; Regents of University of California v. Public Employment Relations Bd. (1990) 220 Cal.App.3d 346, 359; Cal. Evidence (4th ed. 2000) Burden of Proof and Presumptions, § 35, p. 184.)

A. The Requirements For Issuance Of Any CAO Pursuant To Water Code Section 13304

In order to prevail, the Advocacy Team must prove that PSI violated Water Code Section 13304(a). Section 13304(a) provides in part:

> Any person who has discharged or discharges waste into the waters of this state in violation of any waste discharge requirement or other order or prohibition issued by a regional board or the state board, or who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall upon order of the regional board, clean up the waste or abate the effects of the waste, or, in the case of threatened pollution or nuisance, take other necessary remedial action, including, but not limited to, overseeing cleanup and abatement efforts.

(Emphasis added.)

Section 13304(e) defines "threaten" to mean:

[A] condition creating a substantial probability of harm, when the probability and potential extent of harm make it reasonably necessary to take immediate action to prevent, reduce, or mitigate damages to persons, property, or natural resources.

(Emphasis added.)

Water Code Section 13050(l) defines "pollution" to mean:

(1) [A]n alteration of the quality of the waters of the state by waste to a degree which unreasonably affects either of the following:

(A) The waters for beneficial uses.

(B) Facilities which serve these beneficial uses.

(2) "Pollution" may include "contamination."

Section 13050 (k) defines "contamination" to mean:

[A]n impairment of the quality of the waters of the state by waste to a degree which creates a hazard to the public health through poisoning or through the spread of disease. "Contamination" includes any equivalent effect resulting from the disposal of waste, whether or not waters of the state are affected.

(Emphasis added.)

Section 13050(m) defines "nuisance" to mean:

[A]nything which meets all of the following requirements:

(1) Is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property.

(2) Affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.

(3) Occurs during, or as a result of, the treatment or disposal of wastes.

(Emphasis added.)

The Advocacy Team must prove that all the requirements of Section 13304(a) are met by a preponderance of the evidence. Preponderance of the evidence is the evidentiary standard applied in civil cases and in adjudicatory proceedings before state agencies. See, Evid. Code Section 115; Ettinger v. Board of Medical Quality Assurance (1982) 135 Cal.App.3d 853; Skelly v. State Personnel Bd. (1975) 15 Cal.3d 194; Pereyda v. State Personnel Bd. (1975) 15 Cal.App.3d 47, 52 (holding that "[t]he proceeding before the Board [was] a civil one, and hence the burden of proof requires...a preponderance of the evidence.") (abrogated on other grounds by California Youth Authority v. State Personnel Bd. (2002) 104 Cal.App.4th 575). The standard jury instructions on preponderance of the evidence given in civil cases in California states:

> Preponderance of the evidence means evidence that has more convincing force than that opposed to it. If the evidence is so evenly balanced that you are unable to say that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it.

BAJI No. 2.60, BAJI (8th ed.)

The Advocacy Team must prove each of the requirements of Water Code Section 13304 by a preponderance of the evidence in order for any CAO to be issued against PSI. Admissions of the Advocacy Team alone show that the Advocacy Team cannot meet its burden of proof. Possibility, speculation and conjecture are not sufficient proof, even of matters that need only be proven by a preponderance of the evidence (see generally Roddenberry v. Roddenberry (1996) 44 Cal.App.4th 634, 651; Regents of University of California v. Public Employment Relations Bd. (1990) 220 Cal.App.3d 346, 359; Cal. Evidence (4th ed. 2000) Burden of Proof and Presumptions, § 35, p. 184).

B. Water Code Section 13304 Liability Is Not Joint And Several

On the second to last page of its Memorandum of Points and Authorities, and without citation to legal authority, the Advocacy Team suggests that any potential order should

impose a joint and several obligation on the alleged dischargers. (Advocacy Team Brief, pp. 108-109.) There is no legal authority for this proposition. To start with, the text itself of Water Code Section 13304 imposes a several obligation. Second, "severable" liability is appropriate when any injury is divisible, as is the case here if there are violations of Water Code Section 13304. For example, the Draft CAO seeks remediation of perchlorate and TCE, but there is no evidence PSI used TCE, much less that PSI is liable for TCE in the groundwater. Finally, as an entity that contributed to the perchlorate contamination, the Regional Board is estopped from imposing joint and several liability.

1. Section 13304 Imposes a Several Obligation Only

California law provides for three types of legal obligations: joint, several, and joint and several. Civ. Code Section 1430. California law imposes a general presumption against joint and several obligations unless there are express words to the contrary. Civ. Code Section 1431. The interpretation of a several obligation, rather than a joint and several one, is consistent with the policy adopted by the People of California, as codified at Civil Code Section 1431.1, viewing the imposition of joint and several liability as frequently inequitable and unjust.

Water Code Section 13304 imposes only a several obligation. The text of Section 13304 clearly requires the Regional Board to demonstrate that each discharge of waste causes or permits, or threatens to cause of permit, the waste to be discharged or deposited where it is, or probably will be, discharged into waters of the state and creates, or threatens to create, a condition of pollution or nuisance. Section 13304(a) further provides that such person "shall upon order of the regional board, clean up the waste or abate the effects of the waste . . ." The language of the statute does not state that each proven discharger shall be responsible for cleaning up and abating the waste caused by all other discharges that ever occurred on the site.

The creation of a several obligation is further mandated by the conspicuous lack of text in Water Code Section 13304 making reference to or intention to impose a "joint and several" obligation. In fact, the statute is devoid of any mention of a joint and several

obligation which would be an obvious and necessary requirement for the imposition of such liability.

Gerard Thibeault, Executive Director of the Regional Board and a state official, testified in a manner that confirms his understanding that liability under Section 13304 is not joint. For example, Mr. Thibeault testified that neither Emhart nor Goodrich could be liable for the McLaughlin Pit because Apollo built it long after they left the 160-Acre Property. (Thibeault Depo., March 16, 2007, Vol. 2, 473:19-474:14.) Mr. Thibeault's testimony is consistent with the conclusion that there is no joint and several liability under Water Code Section 13304.

2. Severable Liability is Further Appropriate Because the Injury Imposed is Divisible

The evidence demonstrates, and Advocacy Team witnesses admit, that the appearance of perchlorate in the Rialto area's groundwater is likely to have come from a number of separate actions taken over decades by operators of various industries in different places in the greater Rialto area.

a. Traditional tort principles dictate that liability is severable in this proceeding.

Where an injury is distinct or divisible, the liability is severable and the person is responsible for remedying only that portion of the injury. Restatement (Second) of Torts § 433A. "Comment b" of section 433A of the Restatement addresses "distinct harms":

> There are other results which, by their nature, are more capable of apportionment. If two defendants independently shoot the plaintiff at the same time, and one wounds him in the arm and the other in the leg, the ultimate result may be a badly damaged plaintiff in the hospital, but it is still possible, as a logical, reasonable, and practical matter, to regard the two wounds as separate injuries, and as distinct wrongs. The mere coincidence in time does not make the two wounds a single harm, or the conduct of the two defendants one tort. There may be difficulty in the apportionment of some

elements of damages, such as the pain and suffering resulting from the two wounds, or the medical expenses, but this does not mean that one defendant must be liable for the distinct harm inflicted by the other.

"Comment d" of section 433A of the Restatement addresses "divisible harms":

> There are other kinds of harm which, while not so clearly marked out as severable into distinct parts, are still capable of division upon a reasonable and rational basis, and of fair apportionment among the causes responsible. Thus where the cattle of two or more owners trespass upon the plaintiff's land and destroy his crop, the aggregate harm is a lost crop, but it may nevertheless be apportioned among the owners of the cattle, on the basis of the number owned by each, and the reasonable assumption that the respective harm done is proportionate to that number. Where such apportionment can be made without injustice to any of the parties, the court may require it to be made.

The Advocacy Team has not put forth any evidence in this proceeding demonstrating that PSI has caused any harm to the groundwater, and certainly no evidence that PSI has caused an "indivisible" harm.

b. Liability under California's primary hazardous waste remediation law is apportioned according to fault.

The policy of the State is clearly set forth by the Legislature in the Carpenter-Presley-Tanner Hazardous Substance Account Act ("HSAA"), California's primary law for the remediation of hazardous waste sites. Health and Safety Code Sections 25300-25395.45. Liability under the HSAA is apportioned according to fault:

(a) Except as provided in subdivision (f), any party found liable for any costs or expenditures recoverable under this chapter who establishes by a preponderance of the evidence that only a portion of those costs or

expenditures are attributable to that party's actions, shall be required to pay only for that portion.

(b) Except as provided in subdivision (f), if the trier of fact finds the evidence insufficient to establish each party's portion of costs or expenditures under subdivision (a), the court shall apportion those costs or expenditures, to the extent practicable, according to equitable principles, among the defendants.

* * *

(f) Notwithstanding this chapter, any response action contractor who is found liable for any costs or expenditures recoverable under this chapter and who establishes by a preponderance of the evidence that only a portion of those costs or expenditures are attributable to the response action contractor's actions, shall be required to pay only that portion of the costs or expenditures attributable to the response action contractor's actions.

Health and Safety Code Section 25363. (Emphasis added). There is no valid reason for the Hearing Officer to diverge from the State's approach to hazardous waste sites that are remediated under the Health and Safety Code.

3. The State Board is Estopped from Imposing Joint and Several Liability

The State is estopped from imposing joint and several liability on the parties in this matter because of Regional Board Staff's contribution to perchlorate in the groundwater. The Regional Board Staff's actions that contributed to the contamination that is the subject matter of the Draft CAO are set forth in great detail in Sections VI.A and VI.B of this Brief. The actions of the Regional Board Staff, some of which were negligent and some of which were a knowing failure to comply with the law, preclude the State from seeking full payment from other entities. Alternatively, if parties to this proceeding are found to have violated Section 13304, the State itself must also be found to have violated the section and must share liability.

/ / /

The State via the conduct of the Regional Board Staff has violated Section 13304 and must share liability with all found to be responsible in this proceeding. Water Code Section 13304(a) provides in pertinent part, that "[a]ny person who . . . has caused or permitted . . . any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall upon order of the regional board, clean up the waste or abate the effects of the waste. . . ." The word "person" is defined at Section 13050(c) to include "the state." The words "permit" and "permitted" are not defined in the statute. Thus, the words must be given their ordinary dictionary meaning. Black's Law Dictionary defines "permit" in its verb form to mean: "To suffer, allow, consent, let; to give leave or license; to acquiesce, by failure to prevent, or to expressly assent or agree to the doing of an act." Black's Law Dictionary, p. 789 (Abridged 6th ed. 1991).

Thus, because the State is a "person" under Section 13304, and can "permit" discharges within the meaning of the statute, the State too must be held liable if the other parties to this proceeding are found to have violated Section 13304. While PSI continues to maintain that direct evidence of an actual discharge to groundwater or that threatens groundwater is necessary to prove a violation of Section 13304, if the Hearing Officer or State Board conclude differently in this proceeding, then the State must bear responsibility for the discharges it permitted and exacerbated.

Separately, Government Code § 815.6 provides:

> Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.

As set forth in Section VI.B of this Brief, Regional Board Staff repeatedly failed to enforce waste discharge requirements for the Apollo waste pond, now known as the McLaughlin Pit. Most egregiously, after repeatedly stating that the Apollo waste pond needed to be closed

in a manner that complied with Subchapter 15 regulations (Exhibits P68, P69, P73 and P81.), Regional Board Staff ignored their mandatory duty and failed to require a closure of the McLaughlin Pit that complied with Subchapter 15.

The State is now estopped from seeking and imposing joint and several liability. The doctrine of unclean hands is invoked when a plaintiff or prosecutor "has violated conscience, or good faith, or other equitable principle, in his prior conduct." General Electric Co. v. Superior Court of Alameda County, (1955) 45 Cal.2d 897, citing DeGarmo v. Goldman, (1942) 19 Cal.2d 755, 765, quoting from Pomeroy's Equity Jurisprudence, § 397. The doctrine can only be invoked when the prosecutor's misconduct relates directly to the subject of the complaint. see, Lynn v. Duckel, (1956) 46 Cal.2d 845. Here, two of the prosecutors in these proceedings, the Advocacy Team and Rialto, have contributed to the very same wrong they now accuse PSI and others of having performed. The wrongs committed by the Regional Board Staff (including members of the Advocacy Team) must be imputed to the State. The doctrine of unclean hands thus applies to limit the ability of the State to prosecute PSI under joint and several liability.

Adopting similar principles, in Fireman's Fund Ins. v. City of Lodi, 302 F.3d 928 (9th Cir. 2002), the Ninth Circuit held that the City of Lodi could not impose joint and several liability on parties found liable under its hazardous waste ordinance, MERLO. The Ninth Circuit Court of Appeals held that if the City of Lodi could be considered a potentially responsible party, it was prohibited from bringing a cost recovery action that would impose joint and several liability on other parties pursued by the City. Fireman's Fund, 302 F.3d at 947, citing Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298, 1301 (9th Cir. 1997). The Ninth Circuit Court of Appeals reasoned that allowing a party responsible for part of the contamination to impose joint and several liability on others would result in unfair cost shifting, inefficiency, and prolonged litigation. Id. Like the City of Lodi, the State should be prohibited from imposing joint and several liability where such enforcement results in unfair cost shifting and prolonged litigation. Because the State is responsible for the well-documented discharges to groundwater from the McLaughlin Pit, as well as the

discharges from the County (discussed in Section VI.A of this Brief), the State must shoulder its fair share of responsibility now.

IV. ADMISSIONS OF ADVOCACY TEAM MEMBERS ESTABLISH THERE IS NO BASIS FOR ANY CAO AGAINST PSI

A. The Advocacy Team Cannot Prove PSI's Perchlorate Was Discharged Or Threatens To Discharge To The Waters Of The State

The Advocacy Team's witnesses testified under oath that they do not know how much of PSI's perchlorate reached the ground or groundwater, if any. According to Advocacy Team member Ann Sturdivant who drafted the allegations in the Draft CAO regarding PSI, the documentary evidence the Advocacy Team has of Pyro Spectaculars' use of the McLaughlin Pit is limited to a letter dated January 17, 1984, Exhibit 3860 to her deposition (Exhibit P59.) According to that letter, "the materials disposed of in the McLaughlin Pit by Pyro Spectaculars are various aerial shells. The amounts would vary from zero per month up to about 15 or 20 per month at peak season (July-August.)" (Sturdivant Depo., Vol. 1, March 20, 2007, 145:4-11.) (Emphasis added.) However, the Advocacy Team:

- Does not know how many aerial shells over time Pyro Spectaculars may have placed in the McLaughlin Pit. (Sturdivant Depo., Vol. 1, March 20, 2007, 146:23-25; Saremi Depo., Vol. 3, March 27, 2007, 712:11-15.)
- Does not know how much pyrotechnic composition is in an aerial shell. (Sturdivant Depo., Vol. 1, March 20, 2007, 146:14 - 146:19.)
- Does not know how much perchlorate is in any individual aerial shell. (Sturdivant Depo., Vol. 1, March 20, 2007, 146:20-22; Saremi Depo., Vol. 3, March 27, 2007, 712:22 - 713:1.)
- Does not know how much perchlorate from the aerial shells was in the McLaughlin Pit. (Saremi Depo., Vol. 3, March 27, 2007, 713:3-9.)
- Does not know how much, if any, perchlorate got out of aerial shells from Pyro Spectaculars and into the McLaughlin Pit. (Sturdivant Depo., Vol. 1, March

20, 2007, 149:6-9; Saremi Depo., Vol. 2, March 23, 2007, 377:13-23; Vol. 3, March 27, 2007, 712:16-21.)

According to Advocacy Team member Ann Sturdivant, there are some records that would show waste from PSI, but those records would not tell you the amount of perchlorate in the waste. (Sturdivant Depo., Vol. 1, March 20, 2007, 149:21 - 150:7.) The Advocacy Team does not know how much waste, if any, Pyro Spectaculars put in the McLaughlin Pit containing perchlorate. (Saremi Depo., Vol. 3, March 27, 2007, 674:25 - 675:3.) Thus, any attempt to estimate the amount of waste containing perchlorate generated by PSI at the 160-Acre Property would be based on speculation. Speculation is not evidence. Possibility, speculation and conjecture are not sufficient proof, even of matters that need only be proven by a preponderance of the evidence (see generally Roddenberry v. Roddenberry (1996) 44 Cal.App.4th 634, 651; Regents of University of California v. Public Employment Relations Bd. (1990) 220 Cal.App.3d 346, 359; Cal. Evidence (4th ed. 2000) Burden of Proof and Presumptions, § 35, p. 184).

Advocacy Team member Robert Holub, the Regional Board's supervising water resource control engineer, one of the three primary persons at the Regional Board involved in the investigation and a drafter of the CAO, testified that:

Q. . . . You don't have any analytical data to indicate to you that any perchlorate from Pyro Spectaculars, Inc. is a threat or that there's a substantial probability that it will get to groundwater either; correct?

(Objection omitted.)

A. There are a number of parties that operate at the site, including Pyro Spectaculars, that our evidence shows they used perchlorate salts, and those salts collectively -- collectively from those parties did impact the groundwater, based on the groundwater data we have at the site. We have not made an attempt and it's probably not technically possible to differentiate which perchlorate from which party -- how much perchlorate from each party got to groundwater. So I - I'm not going to be able to answer those questions in that respect.

Q. And true to what you just said, you can't tell if any perchlorate from Pyro Spectaculars from a release in the McLaughlin pit got to groundwater; correct? It could all be from Pyrotronics [Apollo]; correct?

A. Yes, but it could all be from one of the parties that put waste there, including Pyro. So that's my -- that's my position.

(Holub Depo., Vol. 1, March 8, 2007, 184:2- 185:3.) (Emphasis added.)

Q. . . . And as you sit here today, you personally have no evidence, right, of any perchlorate put in the McLaughlin pit by Pyro Spectaculars that came in direct contact with water; correct?

A. No analytical data to make that cause-and-effect relationship.

(Holub Depo., Vol. 1, March 8, 2007, 185:5 - 10.) (Emphasis added.)

Q. Did any perchlorate from PSI get to the groundwater?

A. It's my opinion that -- I don't have analytical data that shows perchlorate from PSI got to groundwater.

Q. And that's not just for the McLaughlin pit, that's for the entire 160-acre parcel; correct?

A. Yes.

(Holub Depo., Vol. 1, March 8, 2007, 184:5 - 185:1.) (Emphasis added.)

Advocacy Team member Ann Sturdivant, the Regional Board's senior engineering geologist, one of the persons at the Regional Board involved in the investigation and a primary drafter of the Draft CAO, testified that:

Q. So there's no way to distinguish between perchlorate that may have made its way into the McLaughlin pit from Pyro Spectaculars versus perchlorate that may have made its way into the McLaughlin pit from Pyrotronics, is there?

A. I – I don't think so.

(Sturdivant Depo., Vol. 1, March 20, 2007, 150:8-13.)

Advocacy Team member Kamron Saremi, the Regional Board's water resources control engineer, is the person on the Advocacy Team most involved in the investigation.

Kamron Saremi was a contributor of information for the Draft CAO. Other than cardboard dud shells, Kamron Saremi cannot tell any other type of pyrotechnic material that was put into the McLaughlin Pit by PSI. (Saremi Depo., Vol. 2, March 23, 2007, 376:1-12.) Other than aerial dud shells, Mr. Saremi is not aware of any other waste generated by PSI. (Saremi Depo., Vol. 3, March 27, 2007, 712:6-10.) According to Kamron Saremi:

- There is no way to tell now whether, at any given point in time, there were aerial shells from Pyro Spectaculars in the McLaughlin Pit. (Saremi Depo., Vol. 3, March 27, 2007, 719:4-10.)
- There is no way to tell whether there were aerial shells in the McLaughlin Pit from Pyro Spectaculars on the day the McLaughlin Pit was closed. (Saremi Depo., Vol. 3, March 27, 2007, 720:8-15.)
- There is no way to know whether an aerial shell that was put into the McLaughlin Pit by Apollo versus an aerial shell that was put in the McLaughlin Pit by Pyro Spectaculars is a source of groundwater contamination in the Rialto-Colton-Fontana area. (Saremi Depo., Vol. 3, March 27, 2007, 714:17-23.)

Kamron Saremi testifed under oath that he does not know how much perchlorate waste Apollo put into the McLaughlin Pit. (Saremi Depo., Vol. 3, March 27, 2007, 673:7-15.) In addition, Kamron Saremi testified he has no way of knowing whether perchlorate underneath the McLaughlin Pit was from Apollo or PSI. (Saremi Depo., Vol. 3, March 27, 2007, 672:16 - 673:6.) Specifically, Kamron Saremi testified:

Q. And there's no way to tell whether an aerial shell that was put into the McLaughlin pit by Pyrotronics Corporation [Apollo] versus an aerial shell that was put into the McLaughlin pit by Pyro Spectaculars is a source of groundwater contamination in the Rialto-Colton-Fontana area, is there?

A. There is what -- There's no way of knowing, no.

(Saremi Depo., Vol. 3, March 27, 2007, 714:17-24.)

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The Advocacy Team bases its allegations in the Draft CAO against PSI based on three scenarios of discharge: (1) Disposal of "pyrotechnic waste" in the McLaughlin Pit; (2) testing of aerial shells; and, (3) burning, fires and explosions. The Advocacy Team has no evidence to prove that any perchlorate was released by PSI from any of its scenarios in an amount likely to reach the groundwater 400 feet below ground surface.

Unlike Apollo, PSI did not put perchlorate-laden firework manufacturing waste in the McLaughlin Pit for disposal. From late 1979 until about June 1983, a very small number of aerial shell "duds" were temporarily placed in the McLaughlin Pit by PSI to soak, were then removed and disposed of elsewhere, via burning pursuant to duly authorized permits issued by Rialto Fire Department. (Souza Decl., ¶ 24.) However, when the McLaughlin Pit was allegedly "closed" on December 4, 1988, Mr. McLaughlin reported that the only fireworks components in the pit were from Red Devil, which is part of Apollo and not PSI. (Exhibit P105.) Mr. McLaughlin did not report observing any aerial shells from PSI. (Id.)

A letter from PSI to the San Bernardino County Environmental Health Services Agency dated September 12, 1988 states:

- "We are not a manufacturer of fireworks and therefor deal in finished inventory only."
- "Hazardous Materials - Unless we are repairing defective aerial shells or assembling ground effect set pieces we do not normally generate any hazardous waste."
- "What waste we do accumulate is primarily cuttings of quick-match or fuse which is burned on an regular basis under the jurisdiction of the Rialto Fire Department and the Air Quality Management District. The maximum we would accumulate in any given month would be approximately 50 pounds."

(Exhibit P7.)

The Advocacy Team admits fuse does not contain perchlorate. (Sturdivant Depo., Vol. 1, March 20, 2007, 153:2-6.) Quickmatch is a type of fuse. (Souza Decl., ¶ 13.) PSI's September 12, 1988 letter contradicts the claims made by the Advocacy Team in the Draft

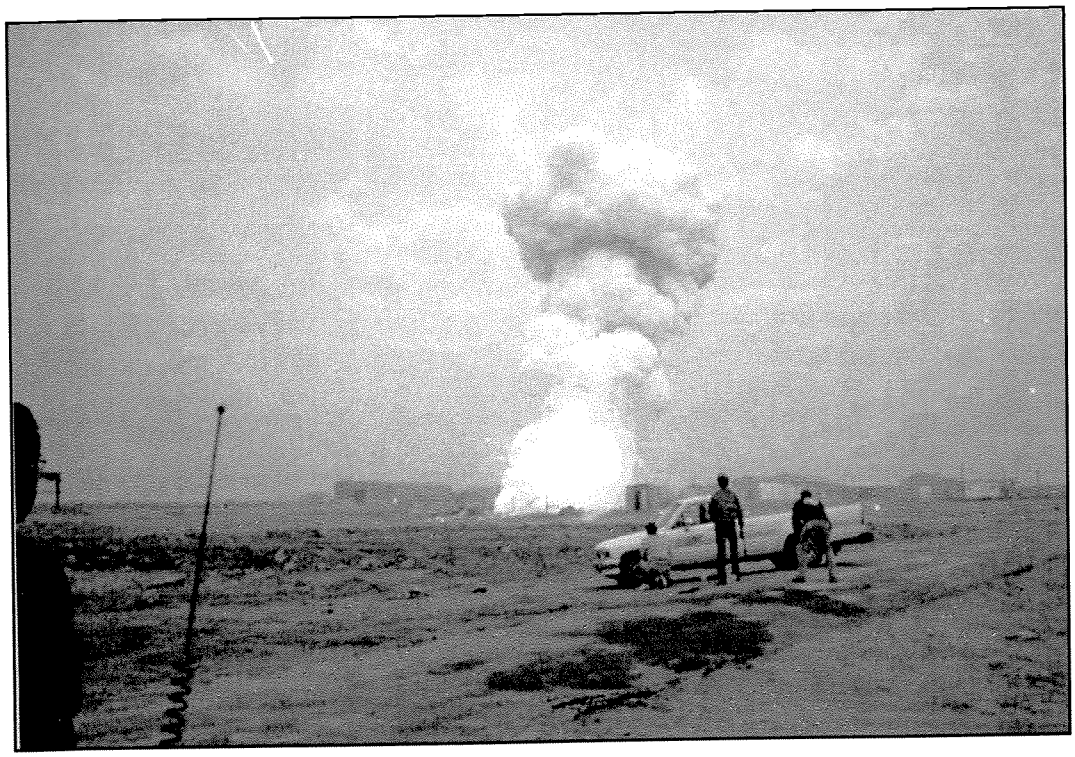
CAO and in the Advocacy Team's Memorandum of Points and Authorities. Testimony under oath by the Advocacy Team witnesses uniformly contradicts the allegations made by the Advocacy Team in the Draft CAO and in the Advocacy Team's Memorandum of Points and Authorities. Most importantly, the Advocacy Team admits they have no evidence to prove the amount of perchlorate, if any, released by PSI.

PSI acknowledges that it tested aerial shells from time to time in the area identified as Fire Zone 13 on Exhibit P135. Such testing was done by Apollo as well, prior to PSI's existence. (Hescox Depo., Vol. 1, 2005, 175:15-176:20.) However, there is no evidence that perchlorate from testing of aerial shells by PSI has discharged to groundwater or is a threat to discharge to groundwater. No soil or groundwater sampling data proves any perchlorate contamination from the testing of aerial shells by PSI. The Advocacy Team witnesses admit they have no evidence of how much of PSI's perchlorate, if any, was discharged to groundwater or is a threat to discharge to groundwater due to aerial testing by PSI. (Sturdivant Depo., Vol. 1, March 20, 2007, 183:3-23.) In fact, Advocacy Team witnesses have admitted under oath that all samples of perchlorate in the soil at the 160-Acre Property could have come from the 1987 massive burn of 54,000 pounds of pyrotechnic waste associated with the alleged "closure" of the McLaughlin Pit. (Exhibit P102.)

For example, Advocacy Team member Kamron Saremi does not know how much of the perchlorate that has been found in the soil on the 160-Acre Property comes from the 1987 burn at the McLaughlin Pit as part of its alleged closure. (Saremi Depo., Vol. 1, March 22, 2007, 307:9 - 308:1.) Similarly, Mr. Saremi has no way of estimating what percentage of the samples taken from the 160-Acre Property that contained perchlorate came from the 1987 massive burn at the McLaughlin Pit as part of its alleged closure. (Saremi Depo., Vol. 1, March 22, 2007, 308:2-13.)

This 1987 massive burn was permitted by the Rialto Fire Department. (Exhibit P103.) The 1987 massive burn was attended by Dan Brown of the Regional Board Staff. (McLaughlin Depo., Vol. 1, December 1, 2006, 87:10-14.) A photograph taken during this

massive burn shows a very large plume of smoke - see below:



(Exhibit P145 at PSI3001190.)

Not surprisingly, the Advocacy Team's untimely April 6, 2007 witness statements do not identify a single witness to testify about discharges to groundwater due to testing of aerial shells.

Rialto's expert witness, Daniel B. Stephens, estimates perchlorate released to the soil will take 320 years (400 feet ÷ 1.25 feet/year = 320 years) to reach groundwater, absent a source of water other than rainfall, to mobilize the perchlorate. ("Declaration of Daniel B. Stephens" submitted by Rialto on April 12, 2007, p. 14.) Any minimal amount of perchlorate remaining on the ground at the 160-Acre Property (or elsewhere in the Rialto-Colton Basin) does not meet the definition of "threaten" in Water Code Section 13304 because that section requires a "condition creating a substantial probability of harm, when the probability and potential extent of harm make it reasonably necessary to take immediate action to prevent, reduce, or mitigate damages to persons, property, or natural resources." If Rialto's

expert is to be believed, there is a minimum of hundreds of years before any threat requires immediate action.

PSI also acknowledges that it periodically burned wood, cardboard, pasteboard, fuse (including Quickmatch), black powder and a few defective finished fireworks on the 160-Acre Property. (Exhibit P7; Souza Decl., ¶ 26.) The materials burned by PSI mostly consisted of fuse (including Quickmatch) and black powder. (Exhibit P7; Souza Decl., ¶ 26.) Extremely small quantities of fireworks composition as a part of the small number of defective fireworks and duds were destroyed by PSI during these burns. (Exhibit P7; Souza Decl., ¶ 26.) All the burning of these materials by PSI was done pursuant to permits issued by the Rialto Fire Department and in accordance with industry standards. (Exhibit 7; Souza Decl., ¶ 26.)

PSI also acknowledges that it had a limited number of fires and explosions on the 160-Acre Property. Fires and explosions are a matter of public record. However, there is no evidence that perchlorate was involved in each of these events, was left on the ground after a fire, actually reached soil or groundwater or is a "threat" to reach groundwater. The Advocacy Team has no soil or groundwater sampling data to indicate any perchlorate contamination from these events on the 160-Acre Property. The Advocacy Team's person on the ground for the investigation was Kamron Saremi, but Mr. Saremi never saw a fire at PSI on the 160-Acre Property and never talked to anybody who saw a fire at PSI. (Saremi Depo., Vol. 2, March 23, 2007, 356:16 - 357:20.) Accordingly, the Advocacy Team's only evidence of fires and explosions is what is in documents. No document in evidence concerning a fire or explosion at the 160-Acre Property provides evidence of:

- How much perchlorate, if any, was released during any fire or explosion at the 160-Acre Property;
- How much perchlorate was left after any fire or explosion at the 160-Acre Property;
- How much perchlorate made its way to soil from any fire or explosion at the 160-Acre Property;

- How much perchlorate from any fire or explosion at the 160-Acre Property actually reached groundwater; or,
- How much perchlorate from any fire or explosion at the 160-Acre Property could reach groundwater in the next 300 years or more.

In short, the Advocacy Team cannot prove that perchlorate from PSI was discharged to groundwater or is a threat to be discharged to groundwater. Accordingly, there is no legal basis for issuance of any CAO to PSI.

B. The Advocacy Team Cannot Prove PSI's Perchlorate Has Created Or Threatens To Create A Condition Of "Pollution" Or "Nuisance"

The Advocacy Team bears the burden of proof by a preponderance of evidence to show that perchlorate from PSI was discharged or will be discharged to groundwater in an amount sufficient to create a condition of "pollution" or "nuisance". The Advocacy Team has no evidence that perchlorate from PSI reached or is a threat to reach groundwater. In fact, each and every Advocacy Team witness who was actually involved in the investigation[4] admits that they do not know whether PSI discharged perchlorate to groundwater or to soil in a manner that threatens groundwater. For example, Advocacy Team member Robert Holub testified:

Q. Did any perchlorate from PSI get to the groundwater?

A. It's my opinion that -- I don't have analytical data that shows perchlorate from PSI got to groundwater.

Q. And that's not just for the McLaughlin pit, that's for the entire 160-acre parcel; correct?

A. Yes.

(Holub Depo., March 8, 2007, Vol.1, 183:20-184:1)

Similarly, Advocacy Team member Ann Sturdivant testified:

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[4]Robert Holub, Ann Sturdivant and Kamron Saremi.

Q. So on any given day, at any sample that's taken from this basin, when you actually take the sample and you look at the data, and if you see perchlorate or you see trichloroethylene, you can't say under oath that that TCE or perchlorate came from any particular operation versus another one, can you?

A. In the water?

Q. Yes.

A. Probably not.

(Sturdivant Depo., Vol. 3, March 29, 2007, 717:15-23.)

Advocacy Team member Kamron Saremi also testified:

Q. . . . And based upon the number of years that these properties have been used by all of these different users and based upon the record that you have in your own file --

A. Yes.

Q. -- you can't say whose perchlorate or trichloroethylene is in any particular well at any particular time, can you, sir?

A. I don't think we can link -- Yeah, that – that's correct.

Q. You can't do that; right?

A. Yeah, because perchlorate and TCE, they were basically common salt and common solvent.

(Saremi Depo., Vol. 2, March 23, 2007, 447:15-448:2.)

Furthermore, Advocacy Team member Robert Holub testified under oath that with respect to all three of the alleged dischargers, he does not know whether or not perchlorate from any of their operations is within a hundred feet of groundwater. (Holub Depo., Vol. 4, April 9, 2007, 956:2-6.) According to Mr. Holub, there is no evidence that perchlorate from any alleged discharges by Goodrich, West Coast Loading or PSI is within a hundred feet of groundwater. (Holub Depo., Vol. 4, April 9, 2007, 956:7-16.)

According to Advocacy Team member Robert Holub, if material was burned and there is so little of it left that it is never going to get to groundwater 400 feet below, then in terms of the Regional Board's regulation to protect waters of the State, it may not be

considered a problem. (Holub Depo., Vol. 3, April 6, 2007, 687:9-14.) If after a pit burn there are only small concentrations of waste material left which, because of the depth of groundwater, will not make it to groundwater for a very long, long time - under those circumstances, from the Regional Board's perspective, that likely would not represent a nuisance to the waters of the State. (Holub Depo., Vol. 3, April 6, 2007, 687:22 - 688:15.) It also would not be a pollutant with respect to groundwater under the same circumstances. (Holub Depo., Vol. 3, April 6, 2007, 688:17-21.) The same must be true for any perchlorate allegedly remaining on the ground after a burn or test of an aerial shell. Mr. Holub's testimony is consistent with the opinion of Rialto's expert, Dr. Stephens, that perchlorate released to the soil at the 160-Acre Property will take 320 years (400 feet ÷ 1.25 feet/year = 320 years) to reach groundwater, absent a source of water other than rainfall, to mobilize the perchlorate. ("Declaration of Daniel B. Stephens" submitted by Rialto on April 12, 2007, p. 14.)

The definitions of pollution and nuisance also include a health risk component. Rialto admits that there is no risk to human health because the water being served to the citizens of Rialto is "safe." (Rialto's website entitled "Rialto's Zero Tolerance Policy, Exhibit P130.) Advocacy Team member Kurt Berchtold, the Regional Board's Assistant Executive Officer, stated at a public hearing that the people of Rialto should not be concerned about the quality of their drinking water. (Transcript from RWQCB Special Board Meeting on November 16, 2005, 117:9-118:18, Exhibit P131 at PSI 3001100.) Similarly, the United States District Court for the Central District of California found there was complete absence of evidence of an immediate threat to public health or the environment as part of its November 1, 2006 order dismissing the City of Colton's case. (Exhibit P132 at PSI 3001110.)

Based on the foregoing, there is no evidence that perchlorate from PSI has created a condition of pollution or nuisance. Accordingly, PSI did not create a condition of "nuisance" or "pollution."

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